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No.....

IN THE

Supreme Court of the United States

October Term, 1980

JANE R. LONG, SUSAN JONE LONG, SANDRA RENEE LONG, a minor, and WILLIAM ELDON LONG, II, a minor, by JANE R. LONG, their Guardian ad Litem,

Petitioners,

vs.

CHEMEHUEVI INDIAN RESERVATION, CHEMEHUEVI INDIAN TRIBE, CHEMEHUEVI INDIAN RESERVATION AND CHEMEHUEVI INDIAN TRIBE, doing business as HAVASU LANDING RESORT MARINA,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal, Fourth District, Second Division of the State of California.

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Questions Presented for Review.

1. Does the State of California have civil jurisdiction pursuant to 28 U.S.C. Section 1360 over an Indian Tribe for the negligent operation of a non-governmental profit seeking business open to the general public, or does said Indian Tribe have absolute sovereign immunity from civil suits?

2. Is the granting of sovereign immunity to an Indian Tribe, while operating a non-governmental profit seeking business open to the general public, a denial of equal protection to Petitioners under the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

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Respondents.

Petition for Writ of Certiorari to the Court of Appeal, Fourth District, Second Division of the State of California.

Opinion Below.

The Opinion of the Court of Appeal, Fourth District, Second Division, appears in Appendix A hereto. [*Long v. Chemehuevi* (1981) 171 Cal.Rptr. 733]

Statement of Jurisdiction.

1. The Opinion of the Court of Appeal, Fourth District, Second Division of the State of California, was entered on January 16, 1981, and became final on March 23, 1981, and the Petition for Hearing to the California Supreme Court

was denied on March 18, 1981, and this petition for certiorari was filed within ninety (90) days of March 18, 1981.

2. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257(3).

Constitutional Provisions and Statutes Involved.

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

> "(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> | "State of | Indian country affected |
> |---|---|
> | California ..... | All Indian country within the State, |
> | Minnesota ..... | All Indian country within the State, |
> | Nebraska ..... | except the Red Lake Reservation |
> | Oregon ..... | All Indian country within the State |
> | Wisconsin ..... | All Indian country within the State, except the Warm Springs Reservation |
> | | All Indian country within the State, except the Menominee Reservation |
>
> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation

made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws. . . ."

Article I of the Constitution of the State of California in pertinent part provides in § 7 (b):

". . . A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . ."

Statement of the Case.

On October 22, 1978, William Eldon Long was killed in a boating accident at the Havasu Landing Resort Marina on the Colorado River. The marina is located on the Chemehuevi Indian Reservation and is owned and operated by the Chemehuevi Indian Tribe as a non-governmental profit seeking operation open to the general public.

The Petitioners, Jane R. Long, on behalf of herself and as Guardian ad Litem for the minor children, Sandra Renee

Long and William Eldon Long, II, and the adult daughter, Susan Jone Long, filed a civil complaint for wrongful death against the Chemehuevi Indian Tribe alleging negligent operation of the boat docks.

On August 16, 1979, the Chemehuevi Indian Tribe filed a general demurrer to the Petitioners' complaint stating that the Tribe was an autonomous, self-governing body under the protection of the federal government, enjoys sovereign immunity, and, absent some sort of waiver, is not subject to California jurisdiction.

The Petitioners filed a Memorandum of points and authorities in opposition to the demurrer of the defendant, Chemehuevi Indian Tribe, and specifically asserted that the State of California had jurisdiction over the Chemehuevi Indian Tribe pursuant to 28 U.S.C. 1360; that the Tribe did not have sovereign immunity specifically when the Tribe was conducting a profit seeking business open to the general public which had absolutely nothing to do with tribal self-governmental functions, and that the United States Constitution and the Constitution of the State of California mandate equal protection of the law.

The trial judge sustained the Tribe's demurrer, and the case against it was dismissed on October 2, 1979.

Thereafter, the Petitioners filed an appeal with the Court of Appeal, Fourth District, Second Division, asserting that the trial court erred as a matter of law in granting the Tribe's general demurrer on the grounds that: (1) California did have civil jurisdiction over the Indian Tribe pursuant to 28 U.S.C. 1360 for the negligent conducting by the Tribe of a profit seeking business open to the general public which had nothing to do with tribal self-governmental functions; (2) that the Tribe's alleged sovereign immunity did not apply because the Petitioners' cause of action was against the tribe

for the negligent operation of a profit seeking business which was not related to the tribe's self-government functions; and (3) that the granting of sovereign immunity to the Indian Tribe was a denial to Petitioners of their guaranteed rights of equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, Section 7 of the Constitution of the State of California.

On January 16, 1981, the order of dismissal was affirmed and in affirming the trial court's order of dismissal, the California Court of Appeal held that the tribe did possess sovereign immunity and was not subject to jurisdiction of the State of California under 28 U.S.C. 1360 because 28 U.S.C. 1360(a) omitted the words "indian tribe"; that in the absence of the indian tribe waiving its sovereign immunity, could not be sued; and that the recognition of sovereign immunity of the Chemehuevi Indian Tribe was not a denial of equal protection to Petitioners under the United States and California Constitutions because it is based upon political rather than racial considerations as enumerated in *Morton v. Mancari*, 417 U.S. 535, 551-552 [94 S.Ct. 2474] and *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89.

On February 17, 1981, the Petitioners filed a petition for hearing with the Supreme Court of the State of California, and said petition was denied on March 18, 1981, without an opinion.

Reasons for Granting the Writ.

1. To Resolve Conflict Between Decisions of the United States Supreme Court and California Court of Appeal.

The decision of the California Court of Appeal should be reviewed because it is in conflict with this Honorable Court's decision in *Montana v. United States* (U.S.Sup.Ct.,

Mar. 24, 1981) .... U.S. ...., and other decisions made by this Honorable Court.

In the instant action, the California Court of Appeal rejected the argument that 28 U.S.C. 1360 conferred jurisdiction to the State of California over Indian tribes for civil causes of action, and declared that Indian tribes have absolute sovereign immunity against civil suits unless expressly waived by them. It is the undersigned's contention that the cases cited by the California Court of Appeal in its Opinion are not legal precedents for the legal proposition of sovereign immunity.

Montana v. United States (U.S.Sup.Ct., Mar. 24, 1981) .... U.S. ...., held in part:

> "Through their original incorporation into the United States, as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers of the tribe. *United States v. Wheeler*, 435 U.S. 313. Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. . . .
>
> ". . . The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . .
>
> ". . . Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so

cannot survive without express Congressional delegation. Citing *Mescalero Apache Tribe v. United States*, 411 U.S. 145, 148; *Willliams v. Lee*, 358 U.S. 217, 219-220, etc. . . .

"The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck*, Cranch 87 — the first Indian case to reach this Court — that the Indian tribes have lost 'any right of governing every person within their limits except themselves'. . . . Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. . . ."

Throughout the present case, from the trial court to the Court of Appeal and to the California Supreme Court, the undersigned has *continuously asserted* the principles set down in *Montana, supra*, that the tribe's sovereign immunity is limited to tribal self-governmental functions and cannot be used as a blanket immunity against civil suits for negligence in the operation by the tribe of a profit seeking business open to the general public.

2. To Decide Important Federal Questions.

The questions of:

(1) whether the State of California has civil jurisdiction pursuant to 28 U.S.C. 1360 over an Indian Tribe for the negligent operation of a non-governmental profit seeking business open to the general public, and

(2) whether an Indian tribe possesses sovereign im-

munity while conducting a profit seeking business open to the general public which is not related to self-governmental inner tribal affairs, and

(3) whether granting sovereign immunity to an Indian tribe is a denial of equal protection to the citizens of the United States and the State of California under the Fifth and Fourteenth Amendments to the United States Constitution and the California Constitution,

are all important questions which have not heretofore been directly decided by this Court.

The reason that these are important federal questions is because Indian tribes throughout the United States have embarked upon various types of profit seeking businesses, such as the Colville Indian Tribe, which went into business selling cigarettes to the general public at a lower price by elimination of the sales tax due the State of Washington (*Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069); and *Montana v. United States* (U.S.Sup.Ct., Mar. 24, 1981) .... U.S. ...., which was a case involving prohibition by the Tribe for hunting and fishing on land within the reservation owned in fee simple by non-Indians and *White Mountain Apache Tribe v. State of Arizona* (U.S.C.A. 9th, Apr. 6, 1981) .... U.S. ...., which was a case involving the tribe allowing hunting and fishing without the necessity of a state license; and other numerous cases.

Therefore, the undersigned submits that this is a *very* important federal question which this Court should decide, to wit: Do Indian tribes have sovereign immunity from civil suit when the tribe embarks on a profit seeking business open to the general public which is not related to tribal governmental functions, or are the Tribes to be held to the same standards of liability as anyone else doing business in the United States? The Opinion of the California Court

of Appeal in the present case is a published decision and is the *only* published decision in the State of California in regards to the matters before this Court. Because California is a populous state and has a great volume of litigation, the California Appellate decisions are cited in numerous jurisdictions other than the State of California as precedent decisions. If the present decision in this case is to stand, then the authorities in the State of California are bound by this decision as rendered by the California Court of Appeal disregarding the rulings by this Honorable Court, because this Honorable Court has never made a direct ruling pertaining to these issues.

White Mountain Apache Tribe v. State of Arizona (U.S.C.A. 9th, Apr. 6, 1981) ... U.S. ..., held in pertinent part that the Federal law did not preempt state law and thus there need not be federal authorization for the state to apply their fish and game laws to the activities of non-Indians on reservations, citing *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069; *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253; *United States v. Sanford,* 547 F.2d 1085, 1089, *et al.*

The Court further held that Public Law 280 and the enabling acts (28 U.S.C. 1360) extend state civil and criminal jurisdiction over acts to which Indians are parties. The court stated:

> "We hold that the right of tribal self-government extends only to intratribal relations and to concurrent civil authority over visitors to reservations. The Indians have lost, by implication from their dependent status, the right to assert that their lands are foreign soil on which state law has no application to non-Indians under tribal protection. . . ."

In *White Mountain Apache Tribe v. State of Arizona, supra,* [5] the court stated that in Indian cases preemption questions are to be settled not so much by divining the actual intent of Congress, but rather by weighing in the judicial scales the present-day state, federal and tribal interests involved, and

> "Accordingly, the policy and the corresponding tribal interests are entitled to weight in the preemption scales here only to the extent that concurrent state licensing and regulation of non-Indian hunting and fishing on reservations actually impede tribal authority and self-determination."

This has been the contention of the Petitioners since the inception of this civil case: that the Tribe's sovereign immunity is subordinate to the civil rights of the citizens of this country and that the Tribe's claim to sovereign immunity does not and should not apply when the Tribe operates a profit seeking business to which it invited the general public and in which the Tribe depends upon the general public to make a financial gain in said business.

The United States Supreme Court has followed the same judicial philosophy when it held in the *Colville* cigarettes case that the tribe could not assert sovereign immunity to defeat the state's authority to tax cigarettes sold by the tribe to non-Indians. In the *Colville* case, the tribe's primary interest was a pecuniary gain, and in the present case, the Chemehuevi Indian Tribe's primary interest is a pecuniary gain in operating its marina facilities. It cannot be said that the imposing of civil liabilities on the tribe for the negligent operation of its profit seeking marina business in any way impedes tribal authority and self determination. The Tribe like any other business can procure from its profits liability insurance for its financial protection.

The Court of Appeal cited *Bryan v. Itasca Cty., Minnesota* (1976) 426 U.S. 373, 389 [96 S.Ct. 2102, 2111] for the legal proposition that the State of California does not have jurisdiction pursuant to § 1360 and that the Chemehuevi Indian Tribe has sovereign immunity. [Appendix, page 3] *Bryan* was a case involving the right of Itasca County to tax mobile homes located on the Indian reservation, which land was held in trust by the United States for the Tribe, and deals with the exceptions stated in § 1360(b), which prohibits "state taxation on any real or personal property . . . belonging to any Indian or any Indian tribe", and had absolutely nothing to do with a civil cause of action against the Indian tribe which conducted a profit seeking business open to the general public. The court stated in *Bryan, supra:*

> "The statute does not in terms provide that the tax laws of a State are among 'civil laws . . . of general application to private persons or private property'. . .
>
> "The primary intent of 28 USCS § 1360 is to grant jurisdiction over private civil litigation involving reservation Indians in state court."

This is precisely the issue involved in the present case, because the present case concerns a private civil litigation against the Indian tribe for the negligent operation of its profit seeking business and does not involve taxation against Indians or Indian tribes in regards to their reservation property.

The Court of Appeal also cited *Parker Drilling Co. v. Metlakatla Indian Community* (1978) 451 F.Supp. 1127, 1138-1139, for the legal proposition that the State of California does not have jurisdiction pursuant to § 1360 and that the Chemehuevi Indian Tribe has sovereign immunity. In *Parker,* the United States Court of Appeals held that the Indian tribe could be liable in regards to the negligent operation of their airport. The court stated that a distinction

had to be made as to whether or not the Indian tribe was operating the airport as a sovereignty or as a corporate entity; that persons using business facilities are not presumed to assume that the corporation is immune from tort liability; and that 28 U.S.C. 1360 indicates state courts DO have jurisdiction in regards to Indians. The court further in its analysis indicated that Indian tribes operating businesses should be placed in the same equal footing as other businesses and subject to liability. (Page 1141, paragraph 4) In the present case, the Chemehuevi Indian Tribe was conducting a marina on the Indian reservation as a profit seeking operation open to the public. It is unlikely that a prospective customer, such as the decedent, would feel comfortable using the marina facilities if he were aware that the marina was immune from tort liability. In the end result, *Parker* does not relieve the Respondents from liability on a civil action by the mere assertion of Indian tribal sovereign immunity, but expresses Congress' intent that they should be held liable as any other corporate entity engaged in a profit seeking business.

The Court of Appeal also cited *Atkinson v. Haldane* (Alaska 1977) 569 P.2d 151, 167, for the legal proposition that Indian tribes possess sovereign immunity. (Appendix, page 3) However, a close analysis of the case will show that this is not the ruling per se. In *Atkinson*, the Metlakatla Indian Community was sued for wrongful death of two Indian residents killed in an automobile accident on the reservation by the negligent operation of the Metlakatla Indian Community's police department. The complaint related to the tribal governmental functions rather than its corporate functions. The Alaska Supreme Court held in effect that 28 U.S.C. 1360 did not give the state court jurisdiction over the Metlakatla Indian Community in respect to their self governmental acts because of the Indian

tribe's immunity. In the present case, as the Court can readily ascertain, the Petitioners did not file suit for wrongful death against the Chemehuevi Indian Tribe because it caused the death of decedent in the exercise of its governmental acts, but because it was the cause of decedent's death by the negligent conducting of its profit seeking operation open to the public, which in no way had anything to do with the tribe's rights to self-government or tribal governmental acts.

The dissenting opinion in *Atkinson, supra,* stated that "the outmoded doctrine of sovereign immunity is inapplicable in this case" (Page 175) and that Title 28 U.S.C. § 1360(a) confers jurisdiction on Alaskan courts over civil causes of action to which Indians are parties which arise in Indian country, and that the Alaskan courts have jurisdiction to determine whether the doctrine of sovereign immunity bars this action. (Page 176) The dissent further stated that 25 U.S.C. § 1302, the *Indian Bill of Rights,* by way of analogy prohibits Indian tribes from abridging civil rights in their exercise of self-government (Page 176), and although the statute does not expressly waive the immunity of the tribes, such waivers have been inferred, citing *Loncassion v. Leekity,* 334 F.Supp. 370 (D.N.M. 1971) etc. The dissent further stated:

> "In my view, the reasons for permitting a waiver of immunity in cases involving civil rights are equally applicable to tort action. Both involve the conduct of governmental officials of the tribe and can result in monetary judgments. Additionally, I believe that both actions may be brought in state court . . . (Page 176)
>
> "Virtually all writers have agreed that on one of these reasons for denying liability is sound, and all of them can be found to have been rejected at one time or another in the decided cases. The current of criticism has been that it is better that the losses due to tortious

conduct should fall upon the municipality rather than the injured individual, and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of the administration of government, which should be distributed by taxes to the public. . . .

"Tribal sovereign immunity has not been established by statute, but is a federally court-made doctrine. . . . There has been no federal decision as to the applicability of the doctrine to tribal sovereign immunity involving suits brought by Indians for torts of the Metlakatla community, and of the applicability of 28 U.S.C. § 1360 to such litigation. This dissent in its suggested disposition of the suit recognizes that a federal question is involved, but until that question is resolved by the United States Supreme Court, a state court may use its best judgment in determining the nature of the applicable federal law. For the reasons outlined above, I believe that the doctrine of tribal sovereign immunity should not be applicable.

"I would hold that the suit is not barred by sovereign immunity and would affirm the decision below."

The Court of Appeal also cited *United States v. United States Fidelity & Guaranty Co.* (1940) 309 U.S. 506 [60 S.Ct. 653] for the legal proposition that the State of California does not have jurisdiction pursuant to § 1360 and that the Chemehuevi Indian Tribe has sovereign immunity. That case was ruled upon on March 25, 1940, some thirteen years *before* the enactment of 28 U.S.C. 1360, and the court stated:

"Congress has consented to an affirmative judgment against the Tribes, . . . (Page 507) and

"The Tribes as now constituted are not sovereigns immune from suit. The defense of sovereign immunity was waived. . . . The trend of modern authorities is

> to differentiate between the authority to render a judgment and the authority to order its enforcement. . . ." (Page 508)

The interesting similarity between the present case and the case of *United States v. United States Fidelity & Guaranty Co., supra,* is that both tribes were engaged in a profit seeking business, and the Chocktaw and Chickasaw Nations' assertion of sovereign immunity was no defense. Another important aspect is that the *United States v. United States Fidelity & Guaranty Co.* case was a well-known decision, and undoubtedly Congress was aware of this case when it enacted § 1360, and being aware of the Supreme Court ruling could have inserted, but did not, in § 1360 that said action did not apply to the Indian tribes but only to the individual Indians. Later cases seem to establish this legal proposition.

In *Fort Mojave Tribe v. San Bernardino County* (1976) 543 F.2d 1253, the United States Court of Appeals held that the County of San Bernardino had the authority to impose a possessory interest tax on non-Indian lessees, and that "Fort Mojave Indian Tribe is subject to California jurisdiction", citing 28 U.S.C.A. 1360(b), and stated:

> "We turn to another relevant federal statute. California is one of the five states mandated by PL-280 to exercise both civil and criminal jurisdiction over the Indian country within their borders. Thus, both . . . Tribe are subject to California jurisdiction. Section 4(b) of PL-280, 28 U.S.C. § 1360(b) . . ."

Martinez v. Southern Ute Tribe, 374 P.2d 693 held that state courts have jurisdiction over Indian tribes.

In *State of Washington, et al. v. Confederated Bands and Tribes of the Yakima Indian Nation* (1979) 99 S.Ct. 740, this Honorable Court held that in the absence of federal

legislation, state law reaches within the exterior boundaries of Indian reservations.

In *Rincon Band of Mission Indians v. County of San Diego, et al.* (1971) 324 F.Supp. 371, the court held that the Indians could not enact any tribal ordinance contrary to County ordinance because of *Public Law* 280, and the court stated that 28 U.S.C. 1360 embodies a corresponding grant to the states of civil jurisdiction over Indian lands.

In the present case, the Court of Appeal stated that the *Quechan* case summarizes the situation. (Appendix, page 4) In the case of *People of the State of Cal. v. Quechan Tribe of Indians* (1979) 595 F.2d 1153, the Indian tribe allowed non-members to fish on the reservation upon the buying of a permit from the Indian tribe. The State of California also wanted to require the non-members to buy a California fishing license to fish on the reservation. 18 U.S.C. 1162(b) specifically states that the State of California shall not have authority to enact "statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof". However, since the *Quechan* ruling, the Ninth Circuit Court of Appeals in *White Mountain Apache Tribe v. State of Arizona* (U.S.C.A 9th, Apr. 6, 1981) ... U.S. ..., held that the state could enforce its hunting and fishing license requirements and substantive regulations against non-Indians who hunt and fish on a reservation with the tribe's permission. *White Mountain* appears to be in direct conflict with the *Quechan* ruling. Since the *White Mountain* ruling is subsequent to the *Quechan* ruling, the *White Mountain* ruling should be the governing law unless and until this Honorable Court decides the conflict between the two decisions. Furthermore, the undersigned cannot understand how the California Court of Appeal could state that *Quechan* summarizes the situation when the situation of the present case and the *Quechan* case are

not governed by the same judicial principles, because *Quechan* deals with an express limitation of state jurisdiction as enumerated by the code section in issue.

The *Quechan* case, *supra*, has no application to the present case, which is a case against an Indian tribe which deliberately set out to conduct a profit seeking business on the Indian reservation; they were like any other group of citizens who decided to get together and open up a marina on the Colorado River. The Chemehuevi Indian Tribe's sovereign immunity is not being invaded by the present civil suit. It is a civil suit against them for the negligent conduct of their business facilities. Sovereign immunity is limited to intra tribal governmental acts and should be strictly construed. No business enterprise should be allowed to operate without being subject to the same liabilities that apply to every business.

In the present case, the Court of Appeal stated, ". . . there is some authority that suits may be maintained against a proprietary corporation established by a sovereign government where the incident in question does not involve the exercise of governmental powers. (*Schippa v. West Virginia Liquor Control Com'n.*, 53 S.E.2d 609, 611.)" (Appendix, page 9) This is the contention of the Petitioners: that any sovereign immunity the Chemehuevi Indian Tribe might possess is limited to its inner-tribal relationships. Hence, sovereign immunity would not act as a bar against a civil suit brought against the tribe for the negligent conducting of its profit seeking business open to the public. Also, the Indian tribe, by operating the profit seeking business, waived any sovereign immunity that it could assert, and it is immaterial whether the waiver is by the forming of a separate corporation or by express waiver. The court can find a waiver by estoppel or waiver by limitations placed

upon the Indian tribes pursuant to the *Indian Civil Rights Act,* which states in part:

> "§ 1302. Constitutional rights
>
> No Indian tribe on exercising power of self-government shall — . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; . . ." (25 U.S.C.A. 1301-1303)

This chapter (§ 1302) abrogates by implication the sovereign immunity the Indian tribes enjoy from suit. *Williams v. Sisseton-Wahpeton-Sioux Tribal Council* (D.C.S.D. 1975), 387 F.Supp. 1194.

In *Loncassion v. Leekity* (1971) 334 F.Supp. 370, the U.S. Circuit Court of Appeals held that the Pueblo of Zuni Indian tribe was liable for personal injuries sustained by the plaintiff when he was shot by two tribal police officers. The court held that an Indian tribe cannot claim sovereign immunity from suit under 25 U.S.C.A. §§ 1301-1303, and stated:

> "A claim for damages is allowable under the Indian Civil Rights Act; money damages are particularly appropriate where the plaintiff has suffered personal physical injury. 25 U.S.C.A. §§ 1301-1303."

In *Hickey v. Crow Creek Housing Authority* (1974) 379 F.Supp. 1002, the court held that the protection guaranteed by the Indian Bill of Rights is available to non-Indians as well as to Indians. 25 U.S.C.A. § 1302.

Indian Civil Rights Act evidences congressional exception to general policy of immunity of Indian tribes from suit. *Johnson v. Lower Elwha Tribal Community, etc., Wash.* (1975) 484 F.2d 200.

In *Daly v. United States* (1973) 483 F.2d 700, the court declared:

"SOVEREIGN IMMUNITY

[5, 6] The appellants contend that the Crow Creek Sioux Tribe and, hence, the Council members, have sovereign immunity, and may not be sued absent Congressional authorization. We disagree. While the Indian Civil Rights Act does not abrogate the sovereign immunity of Indian tribes by specific language, we read the Act to do so by implication. We are convinced that this interpretation is consistent with Congressional intent as without such reading, enforcement of the Act's provisions could not be effected. Therefore, we hold that the District Court properly allowed this suit against the Tribe and its officials. . . ."

In *Dry Creek Lodge, Inc. v. United States* (1975) 515 F.2d 926, the plaintiffs were non-Indians and they claimed that the Indians' putting up a barricade across the road was a violation of 25 U.S.C. § 1302 (*Indian Bill of Rights*). The Federal Court of Appeals held that this tortious act by the Indian tribe was a violation of 25 U.S.C. § 1302 and that the plaintiffs did have a cause of action against the tribe. The Federal Court of Appeals stated:

"14. Indians . . . The Indian Civil Rights Act applies also to non-Indians. 25 U.S.C.A. § 1302. (Page 927)

"16. Indians . . . The Indian Civil Rights Act is the waiver by Congress of tribal immunity. 25 U.S.C.A. § 1302. (Page 928)

"[13, 14] From an examination of the authorities, we are of the opinion that 25 U.S.C. § 1302, which recognizes the right to be protected against deprivation of due process and equal protection of the laws, furnishes a jurisdictional basis which justifies the federal court's entertaining of the case. The plaintiffs are non-Indians and so there remains the question whether an action under the Indian Bill of Rights contemplates an action by one who is not an Indian. There is little law

on this subject. The cases that have considered § 1302 have held that in view of the legislative history, it applies to non-Indians as well as Indians who are under the jurisdiction of the tribe. . . . (Page 933)

"[16] We have not failed to consider the contention of the tribes and the Joint Council that they are protected from suit by the doctrine of tribal immunity, but the cases which have considered § 1302 have held that this enactment is a waiver by Congress of this immunity. . . . (Page 934)"

The foregoing authorities were certainly not concerned about whether or not Indian tribes had expressly waived their rights of sovereign immunity, nor whether the tribes were acting in a governmental capacity or as a corporate entity, but found that the tribes could not escape liability from their tortious conduct by the assertion of sovereign immunity.

In the present case, the Court of Appeal stated that the Petitioners did not attempt to distinguish the tribe's immunity as a proprietor from its immunity as a government. (Appendix, page 8) In the Petitioners' complaint, suit was against the Respondents, "CHEMEHUEVI INDIAN RESERVATION, CHEMEHUEVI INDIAN TRIBE, CHEMEHUEVI INDIAN RESERVATION AND CHEMEHUEVI INDIAN TRIBE, doing business as *Havasu Landing Resort Marina*, and *Does 1 Through 20, Inclusive*", with the appropriate standard type Doe clauses inserted in the body of the complaint. This procedure by attorneys in California pleading in the alternative as to defendants with Does is done so that if, during discovery, the correct designated title of the defendant is ascertained, the plaintiff reserves the right to amend to conform to the facts. It can be assumed at this point that the Chemehuevi Indian Tribe was operating the business and that it used "Havasu

Landing Resort Marina" to designate the name of its commercial enterprise. This assumption is made upon the fact that the Respondents have always appeared in this suit as the "Chemehuevi Indian Tribe" without designating whether Havasu Landing Resort Marina is a fictitious name, corporation, partnership, sole proprietorship, etc. Since the Respondent tribe never put the general public on notice that it was operating Havasu Landing Resort Marina as a part of its sovereignty, the tribe should be estopped from asserting sovereign immunity in the present case. This would be in the spirit of the law — waiver by estoppel.

In *Parker Drilling Co. v. Metlakatla Indian Community* (1978) 451 F.Supp. 1127, 1138-1139, the court did indicate that Indian tribes operating businesses should be placed in the same equal footing as other businesses and subject to liability. The mere fact that the tribe in *Parker* had incorporated the business should not make any difference. The ultimate issue was whether or not the Indians were operating the airport as a part of their sovereignty. However, in the present case, there can be no doubt that the operating of a boat marina with recreational facilities had nothing to do with the inner-tribal government activities. If the *Parker* ruling were to be strictly construed, then the rule would emerge that Indian tribes could use a fictitious business name, not file the certificate of doing business under a fictitious name, as required by California law, and not incorporate, and thus escape civil liability. This is *not* the spirit of the law. The spirit of the law of sovereign immunity is to be strictly construed to sovereign ministerial acts and does not extend to commercial ventures embarked upon by any sovereignty whatsoever.

FURTHER, Petitioners contend that the granting of sovereign immunity to the Chemehuevi Indian Tribe is a denial of equal protection to the Petitioners under Federal and State

Law as enumerated in the Fifth and Fourteenth Amendments of the United States Constitution and Article I, § 7 of the Constitution of the State of California. The undersigned will discuss the equal protection issue as it applies to both the Federal and State Governments under both Constitutions. The reason is that the Court of Appeal did so, and all parties seem to be in agreement that the same laws apply when interpreting violation of equal protection. The equal protection analysis under the Fifth and Fourteenth Amendments is the same. *Bolling v. Sharpe* (1954) 347 U.S. 497; *Buckley v. Valeo* (1975) 424 U.S. 1, 93.

As heretofore noted, the dissenting opinion in *Atkinson v. Haldane* (Alaska 1977) 569 P.2d 151, 167, stated that the doctrine of sovereign immunity is a judicially created doctrine. There are no federal or state statutes which declare sovereign immunity to Indian tribes. Most authorities assert that the doctrine originated in 1833 from *Worcester v. State of Georgia* (1832) 31 U.S. 515, by Chief Justice Marshall, who interpreted "To regulate commerce . . . with the Indian tribes", *U.S. Constitution, Article I, Sec. 8, Cl. 3*, as giving to the tribes sovereign immunity. However, Chief Justice Marshall was dealing with the Indians' right to self rule on the reservation and not with the tribe's civil liabilities when conducting a profit seeking business open to the public.

The Court of Appeal said in the present case that there is no discrimination and no denial of equal protection to the Petitioners because the classification is based on political not racial consideration, citing *Morton v. Mancari*, 417 U.S. 535, 551-552 [94 S.Ct. 2474] and *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 893 (Appendix page 6) and that under 28 U.S.C. § 1360(a) non-tribal Indian businesses may be sued for their tortious conduct. (Appendix, page 6) As the court so noted, the Petitioners have not cited any cases which hold or even suggest that the tribe

is a racial classification. (Appendix, page 6) This is true because the undersigned knows of none, and this is why the case is a case of *First Impression*, and why this case is of paramount importance, not only to the Petitioners, but to all other citizens of this country. The issue, therefore, becomes one of whether the Federal and State courts are arbitrarily discriminating against individual citizens by denying them the right to sue Indian tribes for tortious conduct which is not related to tribal right to self government, because such a denial is arbitrary and injurious.

"It is now settled that discrimination may be so arbitrary and injurious as to be deemed a violation of due process." *Detroit Bank v. United States* (1943) 317 U.S. 329, 63 S.Ct. 297, 301, 87 L.Ed. 304, 311; *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693. State action, for purposes of the Equal Protection Clause, may emanate from rulings of judicial action. *Moose Lodge v. Irvis* (1972) 407 U.S. 163, 92 S.Ct. 1965.

The undersigned submits that *if* Congress were to enact a Federal statute that Indian tribes shall have sovereign immunity from all civil suits in regards to negligent conducting of any profit seeking business, this Honorable Court would declare such a statute unconstitutional as being a denial of equal protection to the citizens of the United States.

In the present case, the Court of Appeal said that under *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.* (1956) 231 F.2d 893, and *Morton v. Mancari* (1974) 417 U.S. 535, 551-552 [94 S.Ct. 2474], you look at the Indians as a tribe and not as individuals when you determine whether or not the petitioners are being denied equal protection of the law. The undersigned disagrees with the Court of Appeal on this interpretation.

Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., supra, was a case wherein Marie Little Finger and David Black Cat had been convicted of the crime of adultery by the tribal court, and Thomas Iron Crow was contesting the authority of the tribe to levy taxes on them as citizens of the United States. The tribal reservation was located in the State of South Dakota. The Federal Court of Appeals held that the tribe had an inner-tribal sovereignty over those residing on the reservation and could enact, according to tribal customs, the crime of adultery; and therefore, the conviction by the tribal court was valid disregarding the fact that Little Finger and Black Cat were also United States citizens. It is the undersigned's opinion that the *Crow* case does not apply to the present case at bar.

In the *Morton* case, *supra,* this Court was called upon to decide whether or not the INDIAN REORGANIZATION ACT of 1934 accorded an employment preference for qualified Indians in the Bureau of Indian Affairs and if so, whether the preference in hiring Indians was a violation of the EQUAL EMPLOYMENT ACT OF 1972 and violative of the Due Process Clause of the Fifth Amendment. In reaching its decision, this Court went back to the basic assimilation policy of Congress and ruled that preference in hiring Indians to work for the Bureau of Indian Affairs on or near Indian reservations was not a violation of the Due Process Clause of the Fifth Amendment, because to hold otherwise would defeat the assimilation policy that Congress had previously set as a goal in 1934. The undersigned has no quarrel with the *Morton* decision. It is good law because as this Court so noted, the Indians were at an educational, sociological disadvantge as to the Caucasian race, and if they were ever to become a part of the general populace, they had to learn to live according to the White man's way of life.

The Petitioners are not claiming that they are being denied due process by employment or in relation to the Indians as individuals. The discrimination which the Petitioners are referring to is that the granting of sovereign immunity to the Chemehuevi Indian Tribe in conducting a profit seeking business which they own and which in no way is related to their quasi sovereignty, is so arbitrary and injurious that it not only discriminates against the Petitioners as individuals, but against every other citizen of the United States, including the individual Indians of the tribe. Not even the State of California nor the Federal Government possesses such a blanket sovereign immunity. This *has* to be a denial of equal protection.

In the present case, the Court of Appeal never explained how its ruling could overcome Article I, § 7 of the California Constitution. The ruling is in direct conflict with said section which provides that in the State of California, no citizens or class of citizens may be granted privileges or immunities not granted on the same terms to all citizens. Here, the class of citizens is the Indian tribe by giving the tribe absolute sovereign immunity against all civil suits, which no other citizens or class of citizens in the State of California possess.

In *White Mountain Apache Tribe v. State of Arizona* (U.S.C.A. 9th, Apr. 6, 1981) ... U.S. ..., the court held that federal law does not preempt state law and thus there need not be federal authorization for states to apply their own laws. Yet, the Court of Appeal in the present case reflected that federal law *has* preempted Article I, § 7 of the California Constitution. In *State of Washington, et al. v. Confederated Bands and Tribes of the Yakima Indian Nation* (1979) 99 S.Ct. 740, this Honorable Court held that state law applies on Indian reservations in the absence of federal legislation. There is no federal legislation which provides for sovereign immunity from civil suits to Indian

tribes. In *Dry Creek Lodge, Inc. v. United States* (1975) 515 F.2d 926, the court held that the Indian Civil Rights Act is a waiver by Congress of tribal immunity. If this is the law, then the California Court of Appeal has given to Respondents immunities not granted on the same terms to all citizens of the State of California and by doing so, has denied equal protection of the law to Petitioners.

3. Decision Ignores Plain Language of 28 U.S.C. 1360 and Is Contrary to Its Express Purpose.

The plain language of 28 U.S.C. 1360(a) states that:

> "Each of the States . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> | "State of | Indian country affected |
> |---|---|
> | California | All Indian country within the State . . ." |

In the present case, the California Court of Appeal held that 28 U.S.C. Section 1360 does not give the State of California civil jurisdiction over Indian tribes, because there is notably absent [in § 1360] any conferral of state jurisdiction over tribes themselves, and as dependent, quasi-sovereign nations, Indian tribes enjoy sovereign immunity, and cannot be sued without the consent of Congress (Appendix, page 3), or without express waiver of immunity by the tribe. (Appendix, pages 7-9)

The doctrine of sovereign immunity is of judicial origin. Congress has never enacted any federal legislation conferring sovereign immunity on Indian tribes. According to

Senate Report No. 699, July 29, 1953, and *House Report No. 848, July 16, 1953, U.S. Code Congressional & Administrative News,* the express purpose of Congress in enacting *Public Law* 280 (28 U.S.C. 1360) was withdrawal of Federal responsibility for Indian affairs and termination of the subjection of Indians to federal laws applicable to Indians as such. (Page 2409)

H.R. 1063, *Background History of This Legislation,* declares on page 2410:

"... 2. *Enactment of legislation terminating Federal responsibility for administering the affairs of individual Indian tribes as rapidly as circumstances will permit*

In addition to legislation presently being considered for individual tribes, and members thereof, the committee is directing particular attention to legislation which would free from Federal supervision and control and from all disabilities and limitations specially applicable to Indians the following: . . .

"... 5. *Enactment of legislation having as its purpose repeal of existing statutory provisions which set Indians apart from other citizens, thereby abolishing certain restrictions deemed discriminatory*

Interrelated legislation in this area deals with —

. . . (e) the question of State civil jurisdiction over Indians; . . . (Page 2411)

"THE PRESENT BILL, H. R. 1063

(Page 2411, 2412) . . . finally, provision was made for permitting the California State courts to adjudicate civil controversies of any nature affecting Indians within the State, except where trust or restricted property was involved.

Need for such legislation on a general, rather than limited basis is grounded on the following:

. . .

> Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.
>
> After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; . . ."

The California Court of Appeal further stated that any ambiguity found in Section 1360 must be resolved in favor of the indians. (Appendix, page 4) It is Petitioners' contention that there is no ambiguity. 28 U.S.C. 1360 is a statute of general jurisdiction conferring upon the State of California complete, unrestricted civil jurisdiction over Indians and Indian tribes. This can be readily ascertained by reviewing the statute in its entirety, and reviewing the legislative history and purpose of enactment of the statute. Congress only limited state jurisdiction under § 1360(b) to alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or restrictions imposed by the United States. Furthermore, § 1360(c) says that any tribal ordinance or custom shall be given full force and effect if said tribal ordinance or custom is not inconsistent with the applicable civil law of the state. If Congress did not intend *Section* 1360 in its entirety to apply to Indian tribes, then there is absolutely no reason for the inclusion of sections (b) and (c) therein. Had Congress intended to confer sovereign immunity to Indian tribes, it

could have done so by merely stating that Indian tribes shall not be subject to this Act.

The present civil suit was and is predicated upon section 1360(a) which declares that the State of California shall have civil jurisdiction to the same extent that such state has jurisdiction over other civil causes of action, and that those civil laws that are of general application to private persons or property shall have the same force and effect within such Indian country. In order to determine the suability of such an entity as the Chemehuevi Indian Tribe, it is thus necessary to consult the relevant case law. A review of the law on sovereign immunity of Indian tribes as cited herein makes it abundantly clear that the Chemehuevi Indian Tribe's operation of a profit seeking business is not so vital to some overriding public interest that it must be immunized from the possibility of civil accountability.

As the House and Senate notes so reflect, it was the purpose of Congress in 1953 when enacting *Public Law* 280 to assimilate Indians into the American population and give them the same rights, privileges, duties, and responsibilities as all other American citizens and to eliminate a nationality class distinction. On the same date that *Public Law* 280 was enacted, Congress enacted *Public Law* 281 to terminate certain federal restrictions upon Indians, and thereafter enacted the *Indian Reorganization Act*. These Acts show the over-all purpose of Congress in enacting legislation regarding Indians. To let stand the judicial decision that Indian tribes are immune from civil suits will defeat the purpose of Congress in its enactment of legislation dealing with Indians.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

GEORGE EDWIN LONG,
of LONG & JASKULSKI,
Attorneys for Petitioners.

APPENDIX A.

Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Second Division, State of California.

Jane R. Long, et al., Plaintiffs and Appellants, v. Chemehuevi Indian Reservation, Defendant and Respondent. 4 Civil 23001. (Super Ct.No. 190266).

APPEAL from the Superior Court of San Bernardino County. Don A. Turner, Judge. Affirmed.

Long & Jaskulski and George Edwin Long for Plaintiffs and Appellants.

Arthur Paul Berg and Ruth A. Phelps for Defendant and Respondent.

THE COURT*

In a wrongful death action, the trial court sustained the general demurrer without leave to amend of the Chemehuevi Indian Tribe, and ordered that the case be dismissed as to the Tribe due to lack of subject jurisdiction. Longs appeal from that order. Other named defendants are not party to this appeal.

FACTS

On October 22, 1978, plaintiffs' decedent, William Long, was killed in a boating accident at the Havasu Landing Resort Marina, on the Colorado River. The marina, located on the Chemehuevi Indian Reservation, is allegedly owned and operated by the Chemehuevi Indian Tribe as a profit seeking operation open to the public.

Longs brought a wrongful death action against the Chemehuevi Tribe, alleging negligent operation of the boat

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*Before Gardner, P.J., Kaufman, J., McDaniel, J.

docks. On August 16, 1979, the Chemehuevi Tribe filed a general demurrer to the Longs' complaint, stating that the tribe was an autonomous, self-governing body under the protection of the federal government, enjoys sovereign immunity, and, absent some sort of waiver, is not subject to California jurisdiction. The trial judge sustained the Tribe's demurrer and the case against it was dismissed on October 2, 1979.

DISCUSSION

I

SOVEREIGN IMMUNITY AND 28 U.S.C. SECTION 1360

Longs claim that 28 U.S.C. section 1360 grants California virtually unlimited civil jurisdiction over the Chemehuevi Indian Tribe.[1] Section 1360 gives California jurisiction over civil causes of action *between Indians* or *to which Indians are parties* arising in Indian country to the same extent that such courts have jurisdiction over other civil causes of ac-

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[1]28 U.S.C. section 1360 says, in part:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
.....	.....
California	All Indian country within the State
.....	.....

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

tion. (28 U.S.C. § 1360(a).) However, "[T]here is notably absent [in § 1360] any conferral of state jurisdiction over the tribes themselves. . . ." (*Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 389 [96 S.Ct. 2102, 2111]. See also, *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127, 1138-1139; *Atkinson v. Haldane* (Alaska) 569 P.2d 151, 167.)

As dependent, quasi-sovereign nations, Indian tribes such as the Chemehuevi enjoy sovereign immunity, and cannot be sued without the consent of Congress.[2] (*United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 [60 S.Ct. 653]; C. Goldberg, *Public Law 280; The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev., 535.) Tribal immunity is based on policy considerations rather than specific constitutional provisions and is generally considered to be co-extensive with the sovereign immunity of the federal government.[3] (*Hamilton v. Nakai*,

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[2]*Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, does not support the proposition that the Indian Tribes have been stripped of sovereign immunity. That case approved a county possessory interest tax imposed on non-Indian lessees of Indian land. Likewise *Agua Caliente Band, etc. v. City of Palm Springs*, 347 F.Supp. 42, basically a zoning authority case, does not address the concept of Indian sovereign immunity.

Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371, like our own decision in *People v. Miranda*, 106 Cal.App.3d 504, involves the acquisition of California jurisdiction over criminal offenses committed in Indian country. The civil aspects of the matter before us and the sovereign immunity question were not before the court in *Rincon* or before us in *Miranda*.

[3]Longs confuse the distinct doctrines of state and tribal immunity in their analysis of *Nevada v. Hall*, 440 U.S. 410 [99 S.Ct. 1182]. Longs incorrectly offer *Hall* as authority for the position that California need only recognize the sovereign immunity of those public entities which the California Legislature chooses to acknowledge. They argue that unless the California Legislature grants the Tribe immunity, the Tribe has no immunity. *Hall* does not involve tribal immunity or Indians and does not support the Longs. *Hall* affirmed the determination of the California courts that Nevada did not have an immunity defense in California litigation concerning an auto collision in California involving a Nevada state vehicle on official Nevada business.

Similarly, *Owen v. City of Independence, Mo.*, 100 S.Ct. 1398, rejected the immunity of a municipality from liability flowing from its constitutional violations and is of no aid. It did not involve tribal immunity or Indians. In *Atkinson, supra*, at pages 167-170, analogizing a tribe with a municipal corporation is rejected.

453 F.2d 152, 158-159.) While the sovereign immunity of the Indian nations is subject to the pleasure of Congress, a congressional waiver "is not to be lightly implied, but must be unequivocally expressed." (*People of State of Cal. v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155.) Any ambiguity found in section 1360 must be resolved in favor of the Indians. (*People v. Rhoades*, 12 Cal.App.3d 720, 723; *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660; *Parker, supra*, at p. 1140.)

Quechan summarizes the situation. "It is a well-established rule that Indian tribes are immune from suit. [Citations omitted.] The sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States, neither can be sued without the consent of Congress. [Citations omitted.] When Congress does consent to suit, the abrogation of immunity is subject to whatever limitations or conditions Congress chooses to impose. [Citations omitted.] Any waiver of immunity is not to be lightly implied, but must be unequivocally expressed. [Citations omitted.]" (At p. 1155.) *Quechan* concluded that tribal sovereign immunity was a bar to a declaratory relief action filed by the State of California.

No case has been cited to us, and we have found none, which concludes or even suggests, that 28 U.S.C. 1360 conferred on California jurisdiction over the Indian tribes as contrasted with individual Indian members of the tribes. The rule seems to remain as noted in *Washington v. Confederated Tribes of Colville*, ... U.S. ... [100 S.Ct. 2069, 2081], that "it must be remembered that tribal sov-

ereignty is dependent on and subordinate to only the Federal Government, not the States." (At 100 S.Ct., p. 2081.)[4]

In the absence of a clear waiver, we must recognize the sovereign immunity of the Chemehuevi Tribe. (*Quechan, supra,* at p. 1155.) Congress, in passing 28 U.S.C. section 1360, could have easily expressed its intent to grant the listed states complete jurisdiction over its resident tribes.[5] Congress' failure to so act must be read as a purposeful decision to reserve to the federal government jurisdiction over the tribes themselves. (*Bryan, supra,* at pp. 388-390 and fn. 14; see, generally, *Washington v. Confederated Bands and Tribes,* 439 U.S. 463 [99 S.Ct. 740]; *Williams v. Lee,* 358 U.S. 217 [79 S.Ct. 269].)[6]

II
EQUAL PROTECTION

The Longs present a variety of arguments that the congressional recognition of the sovereign immunity of the Chemehuevi Tribe amounts to an arbitrary classification

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[4]*Daly v. United States,* 483 F.2d 700, concludes that, by implication, the Indian Civil Rights Act (25 U.S.C. § 1302) abrogated tribal sovereign immunity as such a conclusion is required in order to effect that Act. (At p. 705.) Within this context, *Daly* was followed in *Williams v. Sisseton-Wahpeton Sioux Tribal Council,* 387 F.Supp. 1194, 1198. That Act, not pertinent here, imposes restraints on the powers of tribal self-government in order to preserve constitutional protections for individual tribal members. Nevertheless, the Act is not an abolition of the long recognized sovereignty of the tribes. (*Crowe v. Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1234-1237.)

[5]Subdivision (b) of 28 U.S.C. 1360, the terms of which have no substantive relevance to the matter before us, recognizes certain protections for both the "Indian" and the "Indian tribe." The recognition of the "tribe" within the statute as distinguished from the "Indian" leaves little doubt that omission of the tribal reference in subdivision (a) of the statute was anything other than intentional.

[6]Longs mistakenly rely on various California statutes. They fail to recognize that Congress, not the California Legislature, is the entity that controls the extent to which states may exercise jurisdiction over Indian tribes. This exclusive power is derived from Article I, Section 8 of the United States Constitution. (See: *Morton v. Mancari,* 417 U.S. 535, 551-552 [94 S.Ct. 2474].)

based on race, and violates the equal protection guarantees of the Constitutions of the United States and the State of California. In particular it is argued that there is a clear equal protection violation where sovereign immunity protects a tribe conducting a commercial enterprise open to the public. Longs complain they are denied redress for a wrong simply because of "a discriminatory, arbitrary classification based upon race" or nationality. The Longs complain they are discriminated against because they are Caucasians. They contend that all businesses, Indian and non-Indian, must be treated alike.

Individual Indians may be sued by Indian and non-Indian alike. (28 U.S.C. § 1360(a).) Non-tribal Indian businesses may be sued for their tortious conduct. (*Id.*) Individual Indians similarly situated to the Longs also face the same sovereign immunity bar. (*Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89; cf. fn. 4, *supra*, where the Indian Civil Rights Act is involved.)

No case has been cited to us which holds, or even suggests, that the tribe is a racial classification. In fact, Longs avoid all consideration in the cases of the historical background against which most cases involving the tribes are set and which demonstrates the political, not racial, considerations involved. (*Morton, supra*, at p. 554, fn. 24.) "It would seem clear that the Constitution, as construed by the Supreme Court, acknowledges the paramount authority of the United States with regard to Indian tribes but recognizes the existence of Indian tribes as *quasi* sovereign entities possessing all the inherent rights of sovereignty excepting where restrictions have been placed thereon by the United States itself." (*Iron Crow, supra*, at p. 92.)

In rejecting a Fifth Amendment attack on the policy of Indian employment and advancement preferences in the Bureau of Indian Affairs, the Supreme Court said: "Literally

every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward Indians would be jeopardized." (*Morton, supra,* at p. 552.)

The cases cited by Longs derived from other areas of the law where Indians and Indian tribes were not involved, provide no aid in resolution. Furthermore, Longs' view contains a misunderstanding in assuming that Indians as individuals possess sovereign immunity. (A.O.B., p. 23.) The few Indian cases cited by Longs simply do not lend support to their position. Thus, the appellate burden has not been met. Moreover, the obvious conclusion from the many Indian cases cited above (which Longs do not directly confront in any meaningful or accurate way) is that this country's policies toward the Indian nations demonstrates that the sovereign immunity of the Indian tribes is based on political, rather than racial, considerations and does not violate equal protection under either state or federal Constitutions. This immunity bars suits against the tribe by tribal members as well as nonmembers, and protection does not extend to individual Indians. The immunity of the Chemehuevi Tribe, reflecting legitimate federal policy, is distinctly nonracial in purpose and effect. There has been no racial discrimination here.

III
WAIVER

Somewhat gratuitously we consider the concept of waiving sovereign immunity. Longs did not plead a waiver of sovereign immunity. nor did they argue it below nor have

they presented a waiver argument on appeal. We consider it only because Longs have placed reliance on *Parker, supra,* and have cited *Loncassion v. Leekity,* 334 F.Supp. 370 but for the wrong propositions. Both are waiver cases.[7]

In *Parker,* plaintiff, after crashing into a snow berm at an airport allegedly owned by the Metlakatla Indian Community, brought a negligence action against the community. The court there found that if the Indian community had owned and operated the airport as a governmental organization (the Tribe), plaintiff's suit would have been precluded by the community's sovereign immunity. (*Parker, supra,* at p. 1131.) If, however, the Metlakatla tribe operated the airport as a corporate entity organized under section 17 of the Indian Reorganization Act (25 U.S.C. § 477) the community was able to waive its inherent immunity.[8] (*Parker, supra,* at p. 1131.) Holding that any such waiver must be "clear and explicit," the court found a sufficiently clear consent in the "sue and be sued" clause of the corporate charter.[9]

In the present case, there is no allegation of a waiver similar to that found in *Parker.* Appellants do not attempt to distinguish the tribe's immunity as a proprietor from its immunity as a government. For example, there is some

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[7]We assume, without deciding, that a tribe may unilaterally waive its sovereign immunity. (see: *United States Fidelity & Guaranty Co., supra*). The *Parker* decision did not conclusively find that a waiver existed and *Loncassion* was premised upon a waiver agreement between the tribe and the Bureau of Indian Affairs.

[8]Longs do not allege that the Chemehuevi Tribe operated the Havasu marina as a corporation organized under 25 U.S.C. section 477. Even if alleged, "the mere fact of corporate activity or existence does not waive the sovereign immunity enjoyed by the [tribe]." (*Parker, supra,* at p. 1136.)

[9]"Sue and be sued clauses have long been considered waivers of the sovereign immunity by the United States [citations]." (*Parker, supra,* at p. 1136.)

authority that suits may be maintained against a proprietary corporation established by a sovereign government where the incident in question does not involve the exercise of governmental powers. (*Schippa v. West Virginia Liquor Control Com'n.*, 53 S.E.2d 609, 611.) Nor does appellant allege that the Chemehuevi Tribe gained an economic advantage by grace of its sovereign status.[10] The mere existence of liability insurance is not enough by itself to establish waiver. (*Loncassion, supra,* at p. 373; *Atkinson, supra,* at pp. 168-169.)[11] Lacking both a plausible theory of waiver and some indication of wavier, we cannot find that the Chemehuevi Tribe waived its privilege of sovereign immunity.

Perhaps the reason waiver was not directly addressed here or pleaded below is because there are no facts supporting waiver. Regardless, no waiver is shown, there is no equal protection violation and the doctrine of sovereign immunity applies in the case before us.

Affirmed.

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[10]See *Washington v. Confederated Bands and Tribes, supra* (selling cigarettes to non-tribal public without levying state sales tax).

[11]The complaint does not allege the Tribe was covered by liability insurance. However, at page 19 of Longs' points and authorities in opposition to the demurrer in the trial court, there is a statement as follows: "Upon information and belief, the plaintiffs allege that the defendants are covered by liability insurance."